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No. 98-1802

In The

Supreme Court of the United States

BALTIMORE CITY POLICE DEPARTMENT, et al.,

Petitioners,

v.

FRATERNAL ORDER OF POLICE, LODGE 3, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

ARGUMENT 1

1. The Instant Case Is Unlike the One Contemplated in *Auer*, and No Inter-circuit Conflict Exists with Respect to *Auer*'s Meaning 1

2. The "Comprehensive Record" in this Case Refers in Large Part to the Salary Basis Test Portion of Part 541, Which Was Not at Issue on Appeal in the Fourth Circuit. The Fourth Circuit Acted Properly Because it Recognized That a Balancing Test Was Inapplicable to the Circumstances of this Case 4

3. No Basis Exists for Challenging the Application of the FLSA's Primary Duty Test to State and Local Police Officers 7

   a. While the Costs to State and Local Governments Imposed by Application of the Fair Labor Standards Act to Municipal Police Departments May Be Significant, Those Same Costs Are Offset by the Amount of Money States and Localities Receive from the Federal Government Each Year 7

   b. Notice and Comment under the Administrative Procedure Act Has Been Satisfied as to the Primary Duty Test, the Only Portion of Part 541 at Issue on Appeal in this Case ... 9

   c. It Is Not "Arbitrary" and "Capricious" to Apply the Primary Duty Test Found in Part 541 to Police Officers, Nor Is it Contrary to Congressional Intent..... 11

TABLE OF CONTENTS – Continued

Page

d. There Has Been No Failure in the National Political Process, Contemplated in *Garcia*, That Has Imposed Undue Burdens on States by the Application of the Fair Labor Standards Act to Police Officers 13

e. The Application of the FLSA and Related Regulations to Police Officers Is Constitutional 14

1) Extension of the FLSA to State and Local Law Enforcement Was a Valid Exercise of Delegated Congressional Commerce Power, Especially in Light of this Court's Holding in *Garcia* 14

2) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Necessary and Proper Clause 15

3) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Guarantee Clause 16

4) The Court's Recent Decisions Are Consistent with *Garcia*, and There Is No Real Evidence to Suggest That the States Are Not Adequately Protected by the Structure of the Federal Government, as *Garcia* Emphasized 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Adams v. United States, 40 Fed. Cl. 303 (Fed. Cl. 1998) 2, 3

Arrington v. City of Macon, 973 F. Supp. 1467 (M.D. Ga. 1997) 2, 3, 9

Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C.Cir. 1998) 3

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Balgowin v. New Jersey, 115 F.3d 478 (D.C. Cir. 1997) 2

Bowman v. City of Indianapolis, 133 F.3d 513 (7th Cir. 1998) 2, 3, 9

Boyd v. Glickman, 12 F. Supp. 2d 1261 (M.D. Ala. 1998) 1

Cassell v. FTC, 154 F.3d 478 (D.C.Cir. 1998) 3

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 1, 3, 11

FERC v. Mississippi, 456 U.S. 472 (1982) 6

Fort Hood Barbers Ass'n v. Herman, 137 F.3d 302 (5th Cir. 1998) 3

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) ..... *passim*

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 15

TABLE OF AUTHORITIES – Continued

Page

McCullough v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819) 16

National League of Cities v. Usery, 426 U.S. 833 (1976) 4

New York v. United States, 505 U.S. 152 (1992) 5, 6, 7, 16, 17, 18

Printz v. United States, ___ U.S. ___, 117 S. Ct. 2365 (1997) 5, 6, 7, 15, 16, 18

United States v. Darby, 312 U.S. 100 (1941) 14

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) 18

STATUTES:

29 U.S.C. § 207(k) 14

29 U.S.C. § 207(o) 14

38 U.S.C. § 2021 8

42 U.S.C. § 3601 8

42 U.S.C. § 4321 8

42 U.S.C. § 6101 8

42 U.S.C. § 7401 8

42 U.S.C. § 12101 8

42 U.S.C. § 13101 8

Brady Handgun Violence Prevention Act, Pub.L. 103-159, 107 Stat. 1536 5

TABLE OF AUTHORITIES – Continued

Page

CODE OF FEDERAL REGULATIONS:

29 C.F.R. 541 ..... *passim*

29 C.F.R. 553 10

OTHER:

51 Fed. Reg. 13,410 10

The Federalist No. 22 16

Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 57 (1988) 17

ARGUMENT

1. The Instant Case Is Unlike the One Contemplated in *Auer*, and No Inter-circuit Conflict Exists with Respect to *Auer*'s Meaning.

The language in *Auer* cited by the Department in its Petition for Certiorari at page 12 does not "invite" a case like the one presented here, primarily because the issues the Department raises are those which have been addressed by this Court in other cases involving the FLSA in general, the salary basis test of Part 541 in particular, and their application to local law enforcement officers. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (involving application of FLSA to public employers); *Auer v. Robbins*, 519 U.S. 452 (1997) (involving application of the salary basis test to police officers). In addition, the Petitioners' *Auer* reference regarding challenges to rulemaking does not address the specific subject matter of the FLSA, the salary basis test, and law enforcement officers. It merely illustrates the distinction between a challenge to an agency's failure to amend a regulation and a challenge to an agency's regulation based on its interpretation of the enabling statute or based on flaws in procedural requirements under the APA.[1] If this Court wanted to express a

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[1] Interestingly, the standard of review is different for the two types of challenges which the *Auer* Court recognized as entitled to judicial review without initial recourse to the agency directly. *See Boyd v. Glickman*, 12 F. Supp. 2d 1261, 1266 (M.D. Ala. 1998). In that case, the District Court distinguished the two, noting that the standard of review for interpretative challenges was governed by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and the procedural challenge was governed by the APA §§ 701-706.

desire to hear a case specifically addressing the disciplinary-deduction rule of Part 541 as applied to state and local governments, it presumably would have used "the Department of Labor's regulation" instead of "an agency." To say that this Court "invited this case as a vehicle to address defects in the application of Part 541 to State and local government employers," Pet. for Cert. at 12, is to grossly overstate the ordinary understanding of the Court's language.

Even if the Court did in fact invite this particular type of case with the quoted language from *Auer*, the case at issue here is not a candidate for Supreme Court review because the issue raised by the Department in its Petition for Certiorari mirrors that raised in the Fourth Circuit – the applicability of the salary basis test of Part 541 to local law enforcement. The salary basis test is no longer at issue in this case. Respondent Sergeants and Lieutenants have repeatedly argued in favor of application of the "primary duty" test of Part 541, which the Department fails to address anywhere in its Petition. The salary basis test has been abandoned as an issue in this case; therefore, there is no need for the Court to hear this case.

For much the same reason as noted above, any "[p]ost-*Auer* confusion" among the lower courts, if any truly exists, is largely irrelevant here. Several cases to which the Petitioner cite as approving of or ignoring the *Auer* language and which involve the application of the FLSA to the public sector again address only the salary basis test. *See Balgowin v. New Jersey*, 115 F.3d 478 (D.C. Cir. 1997); *Bowman v. City of Indianapolis*, 133 F.3d 513 (7th Cir. 1998); *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997); *Adams v. United States*, 40 Fed. Cl. 303

(Fed. Cl. 1998). Two cases even make a point to say that the primary duty test is not an issue at all. *See Arrington*, 973 F. Supp. at 1469; *Bowman*, 133 F.3d at 515-16. Because *Garcia* foreclosed the relitigation of the propriety of applying the FLSA overtime provisions to public employees absent a failure of the national political process, the only proper issue in this case was resolved by the Fourth Circuit consistent with prior Supreme Court decisions.

The Police Department's discussion on page 14 of its Petition, citing cases in which challenges to regulations were permitted, is incomplete. *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C.Cir. 1998), did not challenge rulemaking procedures, but addressed agency interpretation, invoking analysis under *Chevron*. The same was true of *Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302 (5th Cir. 1998) and *Adams v. U.S.*, 40 Fed. Cl. 303 (Fed. Cl. 1998). To the extent *Adams* did address the propriety of rulemaking, it followed *Auer*. *Adams*, 40 Fed.Cl. At 306. *Cassell v. FTC*, 154 F.3d 478 (D.C.Cir. 1998), specifically declined to address a rulemaking challenge under the exhaustion doctrine. *Id.* at 485.

The same is true of the asserted conflict appearing in part 3.e. of the Petition, page 22. Those cases did not address rulemaking or notice and comment challenges. Rather, they addressed agency interpretation utilizing an arbitrary and capricious standard.

2. The "Comprehensive Record" in this Case Refers in Large Part to the Salary Basis Test Portion of Part 541, Which Was Not at Issue on Appeal in the Fourth Circuit. The Fourth Circuit Acted Properly Because it Recognized That a Balancing Test Was Inapplicable to the Circumstances of this Case.

As noted above, the issue involving the disciplinary-deduction portion of the salary basis test was disposed of in the lower court. However, the record to which the Department refers has been developed almost exclusively on the basis of the numerous challenges to the salary basis portion of Part 541. In fact, the primary duty test is not mentioned at all in the Department's Petition.

A substantial portion of the Petitioner's argument revolves around the standard for limiting congressional power under the Commerce Clause developed in *Garcia*. There, this Court determined that the test from *National League of Cities v. Usery*, 426 U.S. 833 (1976), i.e., that Congress' commerce power did not extend to regulations which affected the states in "areas of traditional governmental function," was impractical and difficult to apply. *Garcia*, 469 U.S. at 537-48 (quoting *Usery*, 426 U.S. at 845, 852, 854). When *Garcia* was decided, this Court established a new test – that the commerce power extended to regulation of state activities as long as the states had a meaningful opportunity to be involved in the national political process. *Garcia*, 469 U.S. at 554-56. As long as the political process functions normally – as the Framers envisioned – the reasoning goes, rules that are "unduly burdensome" to the States will not be promulgated. *Id.* at 554, 556.

However, it is difficult to see how the Department comes to the conclusion that the Court has molded the *Garcia* standard into a balancing test through its decisions in *Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365 (1997) and *New York v. United States*, 505 U.S. 152 (1992). Both cases invalidated attempts by Congress to regulate the states through legislation requiring states or localities to expend resources and essentially become the vehicle to implement the congressional mandate.[2] Neither case made any reference to balancing tests; each legislative scheme was rejected based on rather transparent attempts by Congress to force states to implement unpopular government policies. In *Printz*, this Court chose to focus on three areas: 1) the historical background of congressional attempts to impose obligations on the executive and judicial branches; 2) the structure of the Constitution itself – namely, the conscious decision of the Framers to create a system that would govern *the people*, not the states and to establish a federal system; and 3) the Court's previous

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[2] *In Printz*, the challenge was to a temporary provision of the Brady Handgun Violence Prevention Act, Pub.L. 103-159, 107 Stat. 1536, which required local law enforcement agencies to perform background checks on applicants who wanted to purchase handguns until the national system mandated by the statute was in place. 117 S. Ct. at 2368. *New York* involved a provision of the Low-level Radioactive Waste Policy Act that required states who did not comply with one of several "options" given them by the statute to "take title" to all the low-level radioactive waste that state produced, as well as to accept all liability for any direct or indirect damages incurred by the owners for failing to take title promptly. 505 U.S. at 153-54. The effect would be for the state to pay to dispose of waste produced by all private entities within that state's boundaries. *Id.* at 174-77.

decisions, including *New York*. *Printz*, 117 S. Ct. at 2369. In *New York*, this Court made it clear that, even if the Commerce Clause gave Congress the power to legislate the performance or prohibition of certain acts, it did not give Congress the ability to directly force the states to perform or prohibit those activities. *New York*, 505 U.S. at 161 (citing *FERC v. Mississippi*, 456 U.S. 472, 762-66 (1982). Neither case addresses a regulation promulgated under a constitutional federal statute; neither attempts to weigh the interests of the states against the interests of the federal government. In fact, the *New York* Court made it clear that no Justice had "ever suggested that [a particularly strong] federal interest would enable Congress to command a state government to enact *state* legislation." 505 U.S. at 178. *Printz* and *New York* instead look to basic concepts of federalism, as it has been understood from the founding of this nation, to determine whether Congress has crossed the line.

While it is true that the *Garcia* Court did not specify what such a "failure in the national political process" would be in practical terms, the record in this case shows that the Petitioners have been unsuccessful in their attempt to demonstrate how the application of the FLSA to state and local law enforcement officers is evidence of a major threat to our system of constitutional federalism. Furthermore, the fact that no legislation has been invalidated using a *Garcia* balancing test does not mean there has been a misperception of *Garcia* by lower courts, as suggested by the Police Department at pages 16-17 of their Petition. It is far more likely evidence that our national political process, which has worked for over 200 years, continues to do so.

3. No Basis Exists for Challenging the Application of the FLSA's Primary Duty Test to State and Local Police Officers

a. While the Costs to State and Local Governments Imposed by Application of the Fair Labor Standards Act to Municipal Police Departments May Be Significant, Those Same Costs Are Offset by the Amount of Money States and Localities Receive from the Federal Government Each Year.

It is significant that the regulations at issue here, those which apply the FLSA to public employers including local law enforcement, do not have the same fatal flaw that the attempted regulations in *Printz* and *New York* had. The laws challenged in those cases mandated States and localities to act in certain ways directly, by forcing them to expend their own resources to implement Congress' wishes. In contrast, the instant case involves applying long-existing Department of Labor regulations to public sector employers. The Supreme Court has already passed on the propriety of such application in numerous cases, including *Garcia* and *Auer*. As a result, the Police Department attempts to show what it believes are the enormous costs associated with compliance and litigation. However, it is important to remember that the same entities who now must comply with regulations under the FLSA receive a sizeable amount of federal money each year, even if not linked directly to the FLSA. The FLSA is not the only federal legislation that requires the states to make financial expenditures in order to comply with a congressional mandate and which has been upheld as a valid exercise of the commerce power.

See e.g., the Clean Air Act, 42 U.S.C. § 7401, the Fair Housing Act, 42 U.S.C. § 3601, environmental policy legislation, 42 U.S.C. § 4321, the Age Discrimination in Employment Act, 42 U.S.C. § 6101, the Americans with Disabilities Act, 42 U.S.C. § 12101, pollution control legislation, 42 U.S.C. § 13101 and the Veteran's Re-employment Rights Act, 38 U.S.C. § 2021. In the face of the cumulative effect of such impositions, the Police Department has offered no empirical evidence of state and local governments being crippled.

In addition, it is necessary to keep the figures cited by the Petitioners in perspective. They rely on figures provided by the Advisory Commission on Intergovernmental Relations ("ACIR") but do not specify what types of costs were included in those figures. Pet. for Cert. at 18. Another issue that the statistics do not address is whether the costs associated with implementing the regulations would remain static every year. It is entirely possible that the initial costs would be high as a result of creating mechanisms for determining exempt status and adjusting work schedules to try to avoid paying overtime to non-exempt employees, but costs in later years could dissipate. The potential litigation costs the Petitioners address may be a factor precisely because of cases such as this one, where state or local governments attempt to relitigate issues that are not at issue on appeal.

b. Notice and Comment under the Administrative Procedure Act Has Been Satisfied as to the Primary Duty Test, the Only Portion of Part 541 at Issue on Appeal in this Case.

The Police Department's entire discussion of the allegedly improper procedure used by the Department of Labor when it applied Part 541 to state and local entities centers around the salary basis test, which was not at issue on appeal in this case. The Police Department has not attempted to mount any sort of challenge to the primary duty test portion of Part 541, even though that portion of the regulation was adopted for application to the public sector along with the salary basis test in Part 553. Presumably, then, the Department would have every reason to challenge its notice of that portion of the exemption test as well. Yet in its Petition, the Department consistently refers only to the DOL's failure to complete its informal rulemaking process of revising Part 541 with respect to the salary basis test. In fact, most of the cases cited by the Department do not even address the primary duty test; those that do mention it only do so to say that it has been satisfied. *See Arrington*, 973 F. Supp. at 1469; *Bowman*, 133 F.3d at 515-16. Even more importantly, this case is indistinguishable from the facts of *Auer*, as the Fourth Circuit noted:

> it is clear that the City's challenge, although phrased in terms of notice and comment, is really an attack on DOL's failure to revisit rulemaking in the wake of *Garcia*. Therefore, because the record does not reveal that the City has petitioned DOL to undertake amendatory rulemaking, we conclude that the City's challenge is premature.

Pet. for Cert., App. 5a. Also of importance is the fact that notice and comment rulemaking existed in reference to the original 1974 amendments extending the FLSA to state and local governments. The Baltimore Police Department was in existence at the time of these amendments, and the 1974 provisions, at least as to the EAP exemptions, virtually mirror the post-*Garcia* exceptions.

Additionally, the notice and comment in reference to 29 C.F.R. 553, which also applies to police, not only mirrors § 541 exemptions, but specifically incorporates § 541 by reference:

> (a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.
>
> * * *
>
> Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements from any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

29 C.F.R. § 553.32. 51 Fed. Reg. 13,410 incorporated the Part 541 reference regarding the notice of the EAP exemptions:

> § 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime requirements for any employee employed in a bona

> fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all the pertinent tests relating to duties, responsibilities, and salary.

Finally, the so-called "futility" in *Auer*'s requirement of first petitioning the Department of Labor, as suggested by the Police Department at page 22 of its petition, would apply, if at all, to salary basis regulations. As discussed *supra*, that is no longer a basis for the Sergeants' and Lieutenants' claims. The Police Department has continually hinged its arguments on salary basis issues, and continues to doggedly attack provisions not part of the Respondents' analysis. Indeed, the *Amicus* petition is nothing but a salary basis attack, underscoring the inapposite nature of the Petitioners' analysis.

c. It Is Not "Arbitrary" and "Capricious" to Apply the Primary Duty Test Found in Part 541 to Police Officers, Nor Is it Contrary to Congressional Intent.

As noted above, the Department has voiced no opposition to the primary duty test of Part 541 during the entire thirteen years that the notice and comment period for the revised Part 541 has been ongoing. Even if they were to challenge the test under the "arbitrary" and "capricious" standard of *Chevron*, that case makes it clear that a court should give great deference to an agency's interpretation of congressional direction as provided by the legislation. 457 U.S. at 842-46. The *Chevron* analysis

requires first that the reviewing court look to the statutory language to see if Congress has provided a clear mandate. *Id.* at 842-43. If so, the court looks to the agency's interpretation of that language to see if it is in accord with the mandate. *Id.* If the language is ambiguous, the court must then defer to the agency's expertise in the area as long as "the agency's answer is based on a permissible construction of the statute." *Id.* at 844. No such test was performed by the Court in *Auer*, so the Department's lengthy discussion of the salary basis test and the relationship of *Auer*'s language precluding review of certain administrative law issues is largely irrelevant and serves merely to bootstrap the Department's contention that *Auer* does not foreclose review of this case.

As to congressional intent, there is little evidence to show that Congress is opposed to the application of DOL's regulations to public employees. *Garcia* was decided in 1985; to date, Congress has taken no action to illustrate a desire to prevent local law enforcement from coming under the umbrella of the FLSA. Subsequent cases specifically addressing the relationship between the FLSA and local law enforcement, cited at length by the Petitioners, have likewise failed to spur congressional action to reverse the direction taken by the DOL.

d. There Has Been No Failure in the National Political Process, Contemplated in *Garcia*, That Has Imposed Undue Burdens on States by the Application of the Fair Labor Standards Act to Police Officers.

The Police Department's expert witnesses testified as to their own perceptions of the direction our government has taken, based on their experience in politics and scholarship. However, neither the experts themselves nor the Department in its Petition was able to show with particularity how the experts' ruminations about state and local governments' inability to participate in the political process was borne out in the instant case. The Petitioners have failed to show any sort of nexus between the application of Part 541 to state and local entities and the testimony of the experts as to the failure of the national political process. Nowhere did they suggest that states and municipalities were unable to provide meaningful input into the process of implementing the FLSA. In fact, states and municipalities are free to petition the DOL for a revision of the current standards; they were also able to participate in the initial notice and comment rulemaking under which the current rules are promulgated. If they then feel that their concerns are not being addressed, they have recourse to forming coalitions and lobbying Congress for a change in the law, or even to influence future congressional elections.[3] But it is disingenuous to argue that the national political process has failed just because

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[3] A good example of such organization is the numerous groups who have filed as *amici curiae* with this Court as well as with the Fourth Circuit.

the complaining states' wishes were not granted with respect to FLSA exemptions. The argument is similar to an appellate advocate who, having presented his argument to the Court, complains of a failure of the judicial process because the Court did not rule in his favor.

In fact, evidence of state and local ability to influence legislation exists empirically in 29 U.S.C. § 207(k), providing for more flexible computation of overtime payment periods for, *inter alia*, police, and 29 U.S.C. § 207(o), allowing crediting public employees with compensatory time. How such clear concessions to state and local governments could exist given the utter failure of the national political process suggested by the Petitioners remains unexplained.

e. The Application of the FLSA and Related Regulations to Police Officers Is Constitutional.

1) Extension of the FLSA to State and Local Law Enforcement Was a Valid Exercise of Delegated Congressional Commerce Power, Especially in Light of this Court's Holding in *Garcia*.

The interstate nexus required by the Commerce Clause is met by application of the regulations promulgated under the FLSA to police officers because the nature of police work can and does have a "substantial effect on interstate commerce," the standard established in *United States v. Darby*, 312 U.S. 100, 119-20 (1941). In the case at bar, the Sergeants and Lieutenants presented evidence showing that Baltimore City Police respond to

calls on Interstates 83 and 95, two major thoroughfares for interstate travel to the Port of Baltimore. Among other things, it provides protection to businesses and manufacturers that engage in interstate commerce, some of its officers conduct out-of-state investigations and assist federal authorities in investigations, it investigates crimes that cross state lines, and is required to go out of state to apprehend fugitives. As a result of such connections, police work in Baltimore City cannot truly be characterized as a purely intrastate activity. Even if the work could be considered purely intrastate, that activity does have a substantial effect on interstate commerce, because absent the Baltimore City Police's presence and their efforts to apprehend criminals and protect people and businesses, interstate commerce passing through the state of Maryland would be severely reduced. Such a situation is analogous to that involved in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). There this Court held that motel owners could not engage in racial discrimination to prevent black people from patronizing their establishment because, although motel business was a purely intrastate activity, it nonetheless substantially affected interstate commerce. *Id.* at 255-258.

2) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Necessary and Proper Clause

The Petitioners are misguided in believing that *Printz* governs their contention that the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, precludes the application of the FLSA to this case. *Printz* involved a direct congressional mandate to states and localities that the

Court found was impermissible under the Constitution. 117 S. Ct. at 2384. It specifically noted that no provision of the Constitution governed such an action, so this Court resorted to a review of history, the structure of the Constitution, and the Court's prior jurisprudence to arrive at a decision. *Id.* at 2369. What is more germane to the necessary and proper issue is the reading of "necessary and proper" by Alexander Hamilton in the Federalist No. 22: "necessary often means no more than needful, requisite, incidental, useful, or conductive to," The Federalist No. 22, at 97, which has been consistently upheld by this Court. *See e.g., McCullough v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819). This broader interpretation conforms to a more reasonable understanding of the federal government's role that limits Congress' power while simultaneously giving Congress the tools it needs to function in its role as a dual sovereign.

3) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Guarantee Clause

The Sergeants and Lieutenants do not argue with the assertion that the guarantee clause operates to protect "dual sovereignty," *New York*, 505 U.S. at 184-86; *Printz*, 117 S. Ct. at 2376-77. What they do disagree with, however, is the contention that national regulation of the wages of local police officers somehow prohibits the federal government from guaranteeing the states a republican form of government. While it is true that police officers enforce state law, it is also true that those officers to whom the regulation at issue would apply are not the

individuals with the discretion to determine "what conduct constitutes a crime and when to effect an arrest." (p. 28, *quoting* Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 57 (1988)). For the most part, the officers who potentially are affected by the overtime regulations of the FLSA are individuals who follow policies set by the Commissioner and his advisors. Their discretion is necessarily limited by their position at the lower end of the hierarchy and the need to have a set of uniform rules to ensure that all people are treated fairly. The fact that the Commissioner is the ultimate arbiter of policy belies the Petitioners' argument; the Commissioner is appointed by the Mayor and is ultimately responsible to the Mayor and the citizens who elected him. Finally, *Garcia* mandates that the FLSA regulations apply to all public employees; the Police Department's implication that police officers are in the same category as governors, legislators, and judges[4] is inexplicable.

4) The Court's Recent Decisions Are Consistent with *Garcia*, and There Is No Real Evidence to Suggest That the States Are Not Adequately Protected by the Structure of the Federal Government, as *Garcia* Emphasized.

New York and *Printz* should not be read to alter the way the Court views federalism, because, while neither

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[4] These categories of public employees are exempt from the FLSA by the statute itself.

explicitly relied on *Garcia*'s "failure of the political process" standard, both involved situations in which this Court did not need to articulate that standard. Both cases involved congressional attempts to directly regulate states and localities which, this Court noted in *Printz*, is not directly addressed in the Constitution. 117 S. Ct. at 2369. The two cases are inapposite to the situation presented by this case which, contrary to the Petitioners' assertions, is controlled by *Garcia* because police officers are public employees and the DOL's regulations were promulgated under properly delegated commerce power. Although a different type of employee was involved in *Garcia*, the fact that both cases involved overtime regulations under the FLSA suggests more of a connection than *Printz* and *New York*, which involved federal legislation forcing states to act in certain ways. Finally, the Petitioners are in error when they assert that a *Garcia* analysis would invalidate application of the FLSA in this case. Pet. for Cert. at 30. They neglect to explain what they mean when they say that the states were "politically isolated . . . at the time of the 1974 Amendments to the FLSA," and that Congress "stripped" the states of their "natural allies." *Id.* The argument is ultimately revealed to be circular; because the FLSA was applied to the States, this necessarily means that States were politically isolated, unable to act.

Even assuming that the Police Department correctly interprets the Court as endorsing the belief that the members of Congress of a State do not represent the citizens of that state, it is important to remember that it is the citizens of that State who elect those same congressional members. The Police Department's citation to *U.S. Term*

Limits v. Thornton, 514 U.S. 779, 803 (1995), omits the context of the discussion, which involved the inability of states to prescribe qualifications for congressional members. To draw from that discussion a conclusion that these elected officials no longer respond to concerns of their respective home states is unwarranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 207(k):

> Employment by public agency engaged in fire protection or law enforcement activities
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(o):

Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

51 Fed. Reg. 13,410:

§ 13 (a)(1) of the Act provides an exemption from both the minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all the pertinent tests relating to duties, responsibilities, and salary.